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# In the Supreme Court of the United States

OCTOBER TERM, 1953

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No. 645

SYRACUSE COLOR PRESS, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court below (R. 211-218) is reported at 209 F. 2d 596. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 14-41, 49-57) are reported at 103 NLRB No. 26.

### JURISDICTION

The decree of the court below was entered on February 8, 1954 (R. 228-230). The petition for a writ of certiorari was filed on March 17, 1954.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

## QUESTION PRESENTED

Whether substantial evidence on the record considered as a whole supports the Board's finding, approved by the court below, that petitioner in violation of Section 8(a)(1) of the Act interfered with, restrained, and coerced its employees by systematically interrogating five key employees, on the eve of a Board election, concerning their membership in a union, their attendance at its meetings, and the membership and attendance at union meetings of their fellow employees.

## STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are set forth in the Petition, pp. 15-17.

## STATEMENT

### I. The Board's findings of fact

The Board found that petitioner had interfered with, restrained and coerced its employees in violation of Section 8(a)(1) of the Act by interrogating them concerning their union membership, their attendance at union meetings, the location of union meetings, and the outcome of a pending representation election. The subsidiary facts upon which these findings rest may be summarized as follows:

### A. *Background*

Prior to the fall of 1950 petitioner's employees were unorganized. Petitioner, however, had an agreement with the Allied Trades Council granting petitioner the privilege of using a union label, which petitioner used on some of its products (R. 50, 26; 192-193, 186-187).[1] This privilege was subject to termination by any of the five members of the Council (R. 26; 187).[2]

In the fall of 1950, International Mailers Union, unaffiliated (hereinafter referred to as Mailers Union), began to organize petitioner's employees (R. 17; 140). The Mailers Union was not a member of the Allied Trades Council (R. 50; 199-200). At about the same time International Brotherhood of Bookbinders, AFL (hereinafter referred to as Bookbinders Union), which was a member of the Council, also commenced organizational activities in petitioner's plant (R. 17; 143-145, 174). Thereafter Mailers Union filed a petition for certification as the bargaining representative of petitioner's employees (R. 17). On March 9, 1951, the Board directed that an election be conducted on March 31 in the production and maintenance unit of petitioner's establishment (R. 50, 17).

About 2 weeks before the election the employees

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[1] Whenever, in a series of references, a semicolon appears, the references preceding it are to the Board's findings; those following are to the supporting evidence.

[2] The Council is composed of the International Typographical Union, International Pressmen and Assistants' Union, International Photoengravers Union, International Stereotypers and Electrotypers Union, and the International Brotherhood of Bookbinders (R. 21, n. 6; 138, 198).

engaged in numerous discussions as to whether petitioner would lose the use of the union label, and thereby also lose business, if Mailers Union won the election (R. 26; 185). Some employees sought information in this regard from Plant Superintendent McGarry (R. 20, 26; 177, 191-192, 143, 198), who had been a member of Bookbinders Union from 1939 to 1950. McGarry reported these incidents to Company officials who subsequently instructed him to call the employees in and explain the label to them (R. 26; 192-193).

Accordingly, about one week before the election, Superintendent McGarry called five of petitioner's 40-odd employees, Carl Anthony, Edward Yagelski, Matthew Wierzbicki, Henry Maholick, and Frank Sarna, into the office to meet with him and General Manager Benedict (R. 26; 193). Anthony, Yagelski, and Sarna were interviewed individually; the other two were interviewed together (R. 50-51; 196). McGarry testified that petitioner selected these "key" people for interview "knowing they would repeat what we said to the balance of the plant" (R. 193-194).

### B. *The interrogations*

Anthony, a shipping clerk, was the first employee called into the plant office (R. 60, 64). General Manager Benedict and Superintendent McGarry discussed with Anthony the Trades Council label and its business advantages, pointing out that if the Mailers Union was selected petitioner might lose its use of the label and consequently suffer a loss of business (R. 21; 198-199, 64). Late in the conver-

sation McGarry asked Anthony if he belonged to the Mailers Union, if he had attended any of its meetings, if he knew of anyone attending such meetings, and where the meetings were held (R. 22, 51; 64). Although Anthony was in fact a member of Mailers Union and had attended its meetings, he denied those facts when McGarry questioned him (R. 52, 22; 60, 65). At the hearing, explaining why he had not disclosed his membership in Mailers Union, Anthony stated that if he had, he "would be put on the spot" (R. 52, 66). At the conclusion of this 10 to 15 minute meeting, McGarry stated that he was going to talk to three or four other employees that morning and asked Anthony to have Yagelski come in (R. 22; 65, 68).

Yagelski, who was employed as a cutter, was, like Anthony, a member of Mailers Union (R. 102, 107). When he arrived at the office, McGarry and Benedict explained to him the significance of the union label (R. 22-23; 99-100). During the conversation Yagelski was asked "if the fellows attended the meetings" of Mailers Union and if he "attended the meetings of the Mailers Union" (R. 23, 51-52; 100-101). Yagelski replied that he had attended meetings of Mailers Union "a few times" (R. 23; 100).

Matthew Wierzbicki and Henry Maholick were called into the office together (R. 23; 85, 108, 196). At the outset of the conversation, Superintendent McGarry asked Wierzbicki "Are you a member of Mailers?" (R. 23; 86). Wierzbicki replied that he was not although he was in fact an active member

(R. 23; 51, 86). McGarry then discussed the possibility that if the Mailers Union prevailed the Allied Trades Council might take away the label with the result that petitioner might "have to close the place down" (R. 23; 86). McGarry also inquired of Wierzbicki as to "what [the employees] talked about" in reference to the two competing unions, but Wierzbicki made a non-committal reply (R. 24; 86-87).

Maholick testified that during the interview McGarry and Benedict not only discussed the possible loss of the Council label if the Mailers Union won, but also discussed how many of the employees were members of Mailers Union (R. 24, 51; 108-109). Either Plant Manager Benedict or McGarry asked Maholick if he "was a Mailer" (R. 24; 108).

Superintendent McGarry commenced the interview with Sarna by saying that Sarna was not being called in for the purpose of eliciting information concerning his membership or nonmembership in any union but simply to explain that if the Mailers Union became the bargaining representative petitioner might lose the right to use the label, which would mean that "work might slacken down" and the employees "might be laid off" (R. 24; 93). However, during the interview McGarry or Benedict asked Sarna whether he "had an opinion about what [he] thought about the election", and Sarna replied that he had no opinion (R. 24, 51-52; 93-94).

On March 31, 1951, the Board-directed election was held and Mailers Union, the only participating union, lost by a vote of 22 to 21 (R. 17, 50).

### II. The Board's conclusions and order

Upon the foregoing facts and the entire record, the Board, agreeing with the Trial Examiner, concluded that petitioner, in violation of Section 8 (a)(1) of the Act, had interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act. In reaching this conclusion the Board relied specifically upon the following interrogation by petitioner's general manager and plant superintendent: (a) questioning employees Anthony, Maholick and Wierzbicki about their membership in Mailers Union, (b) asking employee Yagelski if he attended meetings of Mailers Union, (c) asking employee Anthony if he attended such meetings and where they were held, and (d) asking employee Sarna for his opinion about the outcome of the pending election.

The Board's order (R. 55-57) requires petitioner to cease and desist from the unfair labor practices found and to post appropriate notices.

### III. The decision of the court below

The court below, Chief Judge Chase dissenting, noted that "of necessity, interference, restraint, or coercion depend upon the facts of each individual case" (R. 214), and sustained the findings, conclusions, and order of the Board. The court, distinguishing on their facts the cases relied upon by petitioner, observed (R. 215) that in this case—

> The interrogations were conducted by highly placed officials of respondent, as distinguished

> from minor supervisory officials. It was part of a plan of explanation as distinguished from casual inquiry. It took place in the office of authority, as distinguished from the regular place of activities of the employees. Attendance by the employees was compulsory rather than voluntary or optional. It involved inquiries as to union membership of the employee and fellow employees, attendance at union meetings of the employee and other employees and the location of the meeting place. It sought information of union strength and the names of employees who were members. The interrogations involved only the disfavored union, and were conducted with the knowledge and intention that their substance would be communicated to other employees.

Finally, noting that one of the employees felt constrained to conceal by falsification the fact of his union membership, the court below concluded (R. 216) that "all of the circumstances above referred to may go to make up '* * * at least the aroma of coercion'[3] in which the interrogations were conducted."

The dissenting judge was of the view that in the absence of evidence that the questioning had a coercive effect or that it occurred in a context of employer hostility to union organization, the Board could not infer "that such questioning might engender in the minds of employees a fear of reprisal" (R. 217).

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[3] Quoting *Joy Silk Mills* v. *National Labor Relations Board*, 185 F. 2d 732, 740 (C.A. D.C.), certiorari denied, 341 U.S. 914.

ARGUMENT

Subsequent to the filing of the present petition, this Court denied certiorari on a substantially identical question. *United Biscuit Co.* v. *National Labor Relations Board,* 208 F. 2d 52 (C.A. 8), certiorari denied April 5, 1954, No. 575, this Term. For the reasons stated in our brief in opposition in the *United Biscuit* case, and for the additional reasons outlined below, we submit that certiorari should likewise be denied here.

As we noted in opposing certiorari in *United Biscuit,* all the courts of appeals have recognized that when an employer's interrogation of his employees concerning their union activities passes the limits of non-coercive, casual and isolated inquiry it violates Section 8(a)(1) of the Act. Brief in Opposition, No. 575, this Term, pp. 8-9, n. 3. The decisions which petitioner claims are in conflict with that of the court below, including the decision of the court below in *National Labor Relations Board* v. *Associated Dry Goods Corp.,* 209 F. 2d 593, on which petitioner places primary reliance, reflect no difference in principle but solely a determination that on the records there presented the interrogation was casual, isolated, and perfunctory. In the instant case, as the court below observed (*supra,* pp. 7-8), the facts establish that the interrogation was carefully planned, systematic, and intentionally pervasive of the entire working force; hence, there is no conflict of decisions requiring resolution by this Court.

Contrary to petitioner's contention, the decision below is not vulnerable because the record may not

contain direct proof (1) that petitioner was prompted in interrogating the employees by a purpose to interfere with or restrain them in the exercise of their rights under the Act or (2) that the interrogation actually had a coercive effect. It has been uniformly recognized that "the test of interference, restraint and coercion under § 8(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. * * * The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 814 (C.A. 7). See also *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 805; *cf. Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 42-46, 50-51. Moreover, as the court below observed, the instant record contains "actual proof that the interrogation did, in fact, impart a fear that a truthful answer would be a matter of embarrassment" (R. 216).

Finally, petitioner errs in its reliance upon Section 8(c). For, as the courts have repeatedly held, interrogation of the kind the Board and the court below found in this case, carrying at least an implied threat of reprisal, is not within the protection Section 8(c) recognizes for an employer's expression of "views, argument, or opinion" containing "no threat of reprisal or force or promise of benefit." *National Labor Relations Board* v. *Minnesota Mining & Mfg. Co.*, 179 F. 2d 323, 326 (C.A. 8);

*National Labor Relations Board* v. *Kropp Forge Co.*, 178 F. 2d 822, 827-828 (C.A. 7), certiorari denied, 340 U. S. 810; *National Labor Relations Board* v. *LaSalle Steel Co.*, 178 F. 2d 829, 835 (C.A. 7), certiorari denied, 339 U. S. 963; *National Labor Relations Board* v. *Gate City Cotton Mills*, 167 F. 2d 647, 649 (C.A. 5).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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